Supreme Court, U.S.
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No. 97-807

In The

Supreme Court of the United States

October Term, 1997

KENNETH HUTCHINSON,

Petitioner,

vs.

FISERV C.I.R., INC. and BRIAN MURPHY-MOLLOY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, after reviewing the record for Petitioner's ultimate burden of proving intentional discrimination, properly reversed the district court's denial of Respondents' motion for judgment as a matter of law and remanded the case to the district court for entry of judgment in favor of Respondents.

STATEMENT PURSUANT TO RULE 29.6

The parent company of Respondent Fiserv C.I.R., Inc. is Fiserv Inc. and its only nonwholly owned subsidiary is P.T. Fiserv Indonesia.

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I

INTRODUCTION

Petitioner has attempted to cloud the lack of proof of any age discrimination in this case by seeking certiorari based on rhetoric that contains no substantive merit. The case involves the application, under diversity jurisdiction, of a Michigan discrimination statute to the facts as presented. While the federal authority applied and analyzed in this unpublished decision is persuasive authority under the Michigan Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, *et seq.*, it is not controlling. Petitioner never pleaded or attempted to prove a federal age claim in this case. Yet, Petitioner ignores the fact that no federal issue has ever been presented in this case and argues that the Sixth Circuit Court of Appeals' decision is in conflict with other decisions of other courts of appeal or that the Sixth Circuit's decision is "so far departed" from accepted and usual judicial proceedings as to call for the invocation of this Court's supervisory power. Both are preposterous positions.

Under well-established Michigan state law, in the context of an economic reduction in force case, it is insufficient as a matter of law for an age discrimination claimant to present evidence that a younger employee was retained and a competent older employee was job discontinued. *Matras v. Amoco Oil Co.*, 424 Mich. 675, 385 N.W. 2d 586 (1986); *Plieth v. St. Raymond Church*, 210 Mich. App. 568, 534 N.W. 2d 164 (1995). The Sixth Circuit's decision was a correct statement of Michigan law. In addition, if Petitioner were able to somehow transform his claim to a federal age claim after never pleading such a claim in the trial or appellate courts, the Sixth Circuit's decision does not conflict with cases in other circuits or the standards set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407(1993), and does not conflict with another Sixth Circuit panel's recent

holding in *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997). Most significantly, this case does not present immediate importance beyond the particular facts and parties involved.

As the court of appeals found, this is a work force reduction case. Economic circumstances forced Respondent Fiserv C.I.R. to reduce its work force, including the area in which Petitioner worked. Petitioner worked in an area with six (6) people, and the reduction in force required that the area retain only one (1) position. The company's managers selected the employee to be retained on the basis of performance evaluations. The strongest performer of the six (6) employees in the department had a performance rating of "outstanding" and was retained for the only remaining position. Petitioner himself had rated the retained employee as "outstanding" when he was a supervisor. Petitioner never challenged the qualifications of the individual selected to remain, or the decision that was made; nor did he ever challenge the validity of his performance evaluations. Unlike the other employees whose jobs were discontinued, Petitioner was offered two other positions at the same salary. Petitioner was also eligible for, and offered, a severance and retirement package. The undisputed facts established that Petitioner turned down offers of other employment with Respondent Fiserv C.I.R. and instead chose to retire.

The district court committed reversible error because it failed to follow established precedent applicable to work force reduction cases. Petitioner did not establish his burden of proof of age discrimination. In selecting the employee rated "outstanding" for retention during an economic reduction in force, Fiserv C.I.R. articulated a legitimate business reason which Petitioner failed to prove was pretextual. Therefore, the Sixth Circuit Court of Appeals properly reversed the district court.

COUNTER-STATEMENT OF THE CASE

A. Facts

Petitioner Kenneth Hutchinson, a fifty-six year old male, was employed from 1962 until his retirement in 1989 by Respondent Fiserv C.I.R. and its predecessors, who were in the business of providing data processing services to credit unions. [JA 109]. In 1986, Petitioner, one of three committee members managing Respondent's Troy, Michigan facility, suggested that the company change its management structure from a committee approach to a single branch manager. [JA 402-405, 407-408, 417-419, 652]. In June 1986, Respondent Brian Murphy-Molloy, a man in his mid-thirties, was selected as the data center manager of the Troy facility [JA 417-419], and Petitioner was given the title of "conversion and training manager." In March 1987, Petitioner was designated as a senior account executive with a reporting relationship to Molly Maginity, a woman in her twenties. He lost no salary as a result of any of these assignments and became eligible for commissions. Petitioner never expressed any dissatisfaction with his assignment to senior account executive. [JA 597-598]. Shortly thereafter, Maginity's supervisory authority was removed and given to Charles Smith and Wesley Vasey, who was Petitioner's supervisor at the time he chose to retire. At trial, Petitioner testified categorically that he did not believe that Vasey discriminated against him. [JA 559]. Similarly, he offered no reason to believe that his other direct supervisors discriminated against him; not Maginity [JA 546]; not Smith. [JA 548].

Concerns regarding Petitioner's performance arose shortly after Respondent Murphy-Molloy became branch manager and the ratings on Petitioner's performance evaluations fell. Petitioner demonstrated performance shortcomings in achieving identified performance goals and improperly handled the

purchasing of some equipment. [JA 513-518, 671, 723, 733; JA 437, 669].[1] Petitioner did not complain to anyone about any of his ratings and, in fact, testified that he agreed with the vast majority of his performance evaluation. [JA 479-481, 484, 676; JA 461, 463, 465, 467, 473].

From 1986 to 1989, the company experienced severe economic problems at several of its facilities, forcing it to close offices and to lay off more than 100 employees. [JA 589, 596, 599]. In 1989 alone, the company lost $6,000,000. [JA 589]. Although the Troy, Michigan facility was not closed, the company eliminated thirteen positions between 1988 and 1989, discharging all but one of its five senior account executives. The company chose to retain John Urban, citing Urban's superior performance ratings. [JA 584-585, 600-601, 615-618, 621, 750-775]. At trial, Petitioner admitted that he had also rated Urban as "outstanding" [JA 547] and that ranking and selecting employees on the basis of their performance evaluations would be a legitimate business decision. [JA 558-559]. While Petitioner attempted to argue at trial and in his Petition that the company violated its own policy by not using seniority as the deciding criteria for the individual to be retained, he admitted that the policy is intended to address reinstatement procedures applicable to people *after* their jobs have been discontinued. [JA 565, 777].

After eliminating his position, the company offered Petitioner his choice of accepting one of two alternative positions with the company, or taking early retirement with a severance package. [JA 394-395, 520, 524-525, 572]. Of the job discontinued senior account executives, Petitioner was the only

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1. Petitioner claims he was falsely accused of taking kickbacks with regard to company purchases. However, the record actually reveals that there was never any accusation, but rather only a question regarding purchasing practices to which Petitioner conceded he was handling purchasing in the wrong manner. [JA 437, 669].

one offered alternative positions with the company. [JA 545, 550-551, 602]. While the alternative positions were two pay grades below that of a senior account executive, Petitioner's salary was guaranteed for a full year and he would have the opportunity to apply for other jobs that became available within the company. [JA 619]. Petitioner admitted that both jobs offered to him were comparable positions. [JA 550-551, 543-544]. Petitioner declined the alternative positions, accepted early retirement and ceased working sometime in August 1989. [JA 521, 527, 555, 561, 620]. Petitioner submitted his election for early retirement to be effective March 1, 1990. [JA 741, 743].

In October 1989, Robert Miotke replaced Respondent Murphy-Molloy as the branch manager of the Troy office. By late February 1990, the company's economic outlook had improved and Miotke was allowed to post a position for a second senior account executive. However, Petitioner testified that he never talked to anyone about the possibility of returning to work and that he never complained to any of his former co-workers about being discontent with his retirement. [JA 540-542]. Nor did Petitioner apply for the position. [JA 542, 591, 611, 776]. The company hired Dick Barage, a forty-six year old male.

B. The District Court's Decision

On April 18, 1991, Petitioner filed this lawsuit in the Circuit Court for the County of Oakland, State of Michigan, alleging that his termination violated the age discrimination provisions of the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, *et seq.* Thereafter, Respondents removed this action on the basis of diversity of citizenship to the United States District Court for the Eastern District, Southern Division of Michigan.

From April 11 to April 19, 1995, the parties tried the case

before a jury. Respondents moved the district court for a directed verdict at the close of Petitioner's case and again at the close of their own case. Before denying the motion for directed verdict and deciding to let the case proceed, the trial judge recognized the ultimate question in this dialogue with Petitioner's counsel:

> THE COURT: . . . To show pretext, there has to be some evidence that these people were thinking about age.
>
> MR. BUTLER: Correct.
>
> THE COURT: So where is it?

[JA 635].

The district court asked the right question, but Petitioner never answered. When the motion was renewed at the conclusion of all the evidence, the trial judge was still troubled by the record and asked Petitioner's counsel, "Where is the age discrimination?" [JA 637]. Again, Petitioner's counsel never answered the court's query. Nonetheless, the district court denied both motions.

The jury found in favor of Petitioner and awarded him $800,000. Respondents then filed post-trial motions to obtain a new trial, to amend the judgment and to obtain judgment as a matter of law. The district court denied these motions and entered judgment based on the jury award in favor of Petitioner. Respondents appealed to the United States Court of Appeals for the Sixth Circuit.

C. The Court Of Appeals' Decision

On July 8, 1997, the Sixth Circuit reversed the district court's denial of Respondents' motion for judgment as a matter

of law and remanded the case to the district court to enter judgment in favor of Respondents. Relying on *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991); *Matras v. Amoco Oil Co.*, 424 Mich. 675, 385 N.W. 2d 586 (1986); and *Barnell v. Taubman Co., Inc.*, 203 Mich. App. 110, 512 N.W. 2d 13 (1993), the court concluded, after reviewing all the evidence and inferences in the light most favorable to Petitioner, that Petitioner had failed to raise *any* inference of age discrimination and that a reasonable person could not have concluded that age was a determining factor in Respondent Fiserv C.I.R.'s decision to eliminate Petitioner's position. On July 21, 1997, Petitioner moved for rehearing in the Sixth Circuit. On August 12, 1997, the Sixth Circuit denied Petitioner's motion for rehearing.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI IS IMPROPER IN THIS CASE.

Rather that support a legitimate basis for the grant of certiorari, a review of the petition reveals that the primary basis for seeking certiorari is that the Sixth Circuit decided the instant case incorrectly. Petitioner does not even argue that the instant case poses any significance beyond the facts and named parties. Indeed, the alleged conflict upon which Petitioner bases his appeal is with another panel of the same court of appeals and Petitioner fails to specifically recite any conduct of the Sixth Circuit which departs "from the accepted and usual course of judicial proceedings."

A. This Case Does Not Present Immediate Importance Beyond The Particular Facts And Parties Involved.

This Court has long recognized that an incorrect decision of a lower court is not grounds for granting certiorari: "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." *Boag v. MacDougall*, 454 U.S. 354, 368, 102 S. Ct. 695, 70 L. Ed. 2d 542 (1982) (Rehnquist, J., dissenting). As Justice Rehnquist commented in *Boag v. MacDougall*, if the Supreme Court

> took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, [it] could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.

Id.

Petitioner argues that the Sixth Circuit improperly applied the burden shifting analysis established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and most recently addressed in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). Petitioner likewise argues that the Sixth Circuit's decision in this case conflicts with another Sixth Circuit panel's holding in *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997). Thus, Petitioner seeks to have this Court reaffirm its holding in *Hicks* and resolve an alleged intra-circuit conflict. Neither of these grounds warrant the grant of certiorari. To the contrary, the court of appeals' decision at issue

in this case is not published and does not purport to announce a new interpretation of *Hicks*. Similarly, by Petitioner's own argument, the Sixth Circuit's subsequent, published opinion in *Kline* properly sets forth evidentiary burden shifting under *Hicks*. Thus, the ramifications of the Sixth Circuit's opinion in this case are limited solely to the parties to this lawsuit. This case simply does not have "immediate importance far beyond the particular facts and parties involved."

B. Conflicts Between Different Panels Of The Same Court Of Appeals Are Insufficient Grounds For Certiorari.

Even if this case had importance beyond the instant facts and parties, reaffirming this Court's holding in *Hicks* is not a sufficient ground to grant certiorari. This Court has noted that it makes "poor use of judicial resources when, as here, [it takes] a case merely to reaffirm (without revisiting) settled law." *Powell v. Nevada*, 511 U.S. 79, 114 S. Ct. 1280, 128 L. Ed. 2d 1, 9 (1994) (Thomas, J., dissenting). Moreover, the alleged conflict with another panel of the same court of appeals is also insufficient to warrant the grant of certiorari. It is well established that:

> [C]ontrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself.

23 James W. Moore, *et al.*, Moore's Federal Practice, ¶ 510.21[2] n.4 (3d ed. 1997) (quoting Harlin, *Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958)); *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 1 L.Ed. 658 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). To reconcile the alleged conflict, Petitioner should

have filed a motion for rehearing en banc, which he did not do. Petitioner simply fails to establish grounds for this Court to grant certiorari.

II.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH HICKS.

The essence of Petitioner's appeal lies in his claim that the Sixth Circuit erred when it proceeded "directly to the ultimate question whether plaintiff has established discrimination" because the case had been tried on the merits. *See, e.g., Brownlow v. Edgecomb Metals Co.*, 867 F.2d 960, 963 (6th Cir. 1989). However, Petitioner fails to show how the court's reliance on *Brownlow* in any way conflicts with this Court's holding in *Hicks* or the application of federal authority under the Michigan Elliott-Larsen Civil Rights Act.

Petitioner argues that reviewing the record for evidence of discrimination somehow runs afoul of *Hicks* by requiring *direct* evidence of discrimination. Taken to its logical conclusion, according to Petitioner's argument, he is entitled to judgment if he establishes a prima facie case and introduces some evidence that the employer's articulate reason was pretextual. Petitioner's argument is incorrect for at least three reasons.

A. The Court Of Appeals Properly Reviewed The Record For Petitioner's Ultimate Burden Of Establishing Intentional Discrimination.

Petitioner first ignores the fact that once the plaintiff provides sufficient evidence of pretext, the "burden now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." *Hicks*, 113 S. Ct. at 2752 (quoting *Texas Department of Community Affairs v.*

Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). Indeed, this Court reaffirmed in *Hicks* that:

> [O]nce, the defendant has responded to the plaintiff's prima facie case, "the district court has before it all the evidence it needs to decide" *not* (as the dissent would have it) whether defendant's response is credible, but "whether defendant intentionally discriminated against the plaintiff." On the state of the record at the close of the evidence, the District Court in this case should have proceeded to this specific question directly, just as district courts decide disputed questions of fact in other civil litigation.

Hicks, 113 S. Ct. at 2753-54. Considering that Petitioner has the ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination and that Petitioner's burden of establishing pretext merges with his ultimate burden of establishing intentional discrimination, it is clear that the court of appeals did not err in reviewing the record to answer the "ultimate question whether plaintiff has established discrimination."

B. Evidence To Establish A Prima Facie Case Is Insufficient To Overcome A Fed. R. Civ. P. 50(a) Or (b) Motion For A Judgment As A Matter Of Law.

Second, Petitioner confuses the quantum of evidence necessary to state a prima facie case and that sufficient to overcome a motion for a judgment as a matter of law. As this Court held in *Hicks*, "what is required to establish the *McDonnell Douglas* prima facie case is infinitely less than what a directed verdict demands." *Hicks* 113 S. Ct. at 2751. Here, the court of appeals held that because another employee

> was judged the more competent of the two employees and Hutchinson does not challenge the impartiality of that judgment, Hutchinson has failed to demonstrate how Urban's retention constituted age discrimination.

[Pet. App. B, A-8]. "Hutchinson has failed to produce any evidence that age was a determining factor in the elimination of his job." [Pet. App. B, A-9]. Thus, the court of appeals, after considering all of the evidence adduced at trial in the light most favorable to the Petitioner, held that Petitioner's circumstantial evidence was insufficient to create an inference of discrimination.

C. Petitioner Failed To Establish Intentional Discrimination By A Preponderance Of The Evidence.

Third, Petitioner ignores the fact that the *McDonnell Douglas* burden shifting analysis merely allows Petitioner to prove discrimination through circumstantial evidence rather than direct evidence. Nothing in the Sixth Circuit's analysis or this Court's analysis in *Hicks* absolves Petitioner of his burden to prove intentional discrimination. In *Hicks*, this Court reaffirmed that once the employer provides evidence of a legitimate non-discriminatory reason for its action, the presumption raised by the plaintiff's prima facie case drops from the case. This Court held:

> If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and drops from the case. The plaintiff then has the full and fair opportunity to demonstrate, through presentation of his own case and through cross-examination of the defendant's witnesses, that the proffered reason was not the true reason for the employment decision and that [age] was. He retains

> that ultimate burden of persuading the trier of fact that he has been the ultimate victim of intentional discrimination.

Hicks, 113 S. Ct. at 2748 (citations omitted). Thus, as this Court's holding in *Hicks* makes clear, regardless of whether Petitioner proceeds with direct evidence or circumstantial evidence under *McDonnell Douglas*, he must still establish intentional discrimination by a preponderance of the evidence. As discussed above, the court of appeals found that Petitioner presented insufficient evidence to create any inference of discrimination. The court of appeals similarly found that Petitioner presented insufficient evidence of pretext. The court held: the company's "financial situation greatly improved between June 1989, when it discharged four of the five senior account executives, and February 1990, when it decided to hire Barage" and "Hutchinson neither expressed any interest in returning to work at Citicorp; he never sought the position that Barage was hired to fill." [Pet. App. B, A-9]. Accordingly, Petitioner failed to prove intentional discrimination by a preponderance of the evidence.

D. The "Pretext Plus" Analysis Is The Law.

Petitioner also argues that the court of appeals required him to establish "pretext plus," *i.e.*, that the employer's articulated reason was pretextual *and* that the real reason for its action was illegal discrimination. Petitioner relies on this Court's statement in *Hicks* that

> [R]ejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "no additional proof of discrimination is required."

Hicks, 113 S. Ct. at 2749. However, Petitioner fails to acknowledge the footnote in the middle of the quoted statement:

> [T]here is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show "*both* that the reason was false, and that discrimination was the real reason," . . . and (2) "it is not enough to disbelieve the employer . . . ." Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, *there must be a finding of discrimination.*

Id. at 2549, n.4. Indeed, this Court held in *Hicks* that a "reason cannot be proved to be 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Id.* at 2751-52. Accordingly, *Hicks* adopts the "pretext plus" standard.

E. The Court Of Appeals Did Not Require Petitioner To Present Direct Evidence Of Discrimination.

Even if this Court rejected the "pretext plus" standard in *Hicks*, the Court did not do away with the requirement that a plaintiff establish that the employer's reason was pretextual in some way. Consistent with its ultimate burden of proving intentional discrimination, a plaintiff must produce evidence that the employer's proffered reason was not the true reason for its action. Once the plaintiff makes this showing, the circumstantial evidence supporting his prima facie case combined with the disbelief of the employer's proffered reason for its actions *may be*, but is not necessarily, sufficient evidence of intentional discrimination.

Here, the court of appeals held that Petitioner failed to produce any evidence that age was a determining factor in the elimination of his job. In so holding, the court did not require Petitioner to produce direct evidence of discrimination. To the

contrary, the court reviewed Petitioner's circumstantial evidence and determined that the circumstantial evidence was insufficient to create any inference of discrimination and insufficient to show that the employer's reason was pretextual. Nothing in this analysis required Petitioner to offer direct evidence of discrimination.

F. The Court Of Appeals' Decision Does Not Conflict With Its Subsequent Decision In *Kline*.

Petitioner's reliance on the Sixth Circuit's holding in *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 1997 WL 631184 (6th Cir. 1997), does not change the appropriateness of the lower court's holding here. As set forth above, even if the court of appeals holding here conflicted with *Kline*, the Supreme Court is not the proper forum for intra-circuit conflicts. To reconcile conflicting decisions of two panels, Petitioner should have filed a motion for rehearing en banc.

Petitioner did not file a motion for rehearing en banc, no doubt because the court of appeals' decision here does not conflict with *Kline*. The panel in *Kline* held:

> [O]nce a plaintiff has disproved the reasons offered by the defendant, the fact finder is permitted to infer discrimination. A plaintiff does not need to introduce additional evidence of discrimination to prevail on the merits. Once a plaintiff establishes its prima facie case, this, along with disbelief of the defendant's proffered reasons for the negative employment actions, will permit a finding of discrimination by the fact finder.

Kline, 1997 WL 631184, at *11.

Here, nothing in the court of appeals' decision required

Petitioner to introduce additional evidence of discrimination. Indeed, the court of appeals held that Petitioner failed to create any inference of discrimination and failed to disprove the reasons offered by the defendant. The court held: because another employee

> was judged the more competent of the two employees and Hutchinson does not challenge the impartiality of that judgment, Hutchinson has failed to demonstrate how Urban's retention constituted age discrimination.

[Pet. App. B, A-8]. The company's

> financial situation greatly improved between June 1989, when it discharged four of the five senior account executives, and February 1990, when it decided to hire Barage. . . . Hutchinson neither expressed any interest in returning to work at Citicorp; he never sought the position that Barage was hired to fill. . . . Hutchinson has failed to produce any evidence that age was a determining factor in the elimination of his job.

[Pet. App. B, A-9]. Thus, there was insufficient evidence of intentional discrimination and the lower court's decision does not conflict with *Kline*.

III.

THERE WAS NO DISCRIMINATION AS A MATTER OF LAW.

A. The Fact That Petitioner's Job Was Discontinued In A Reduction In Force Is Insufficient To Prove Age Discrimination.

This is a work force reduction case. The trial court erred in failing to follow the precedent applicable to reduction in force cases. Corporate reorganizations and reductions in force do not in-and-of-themselves create age discrimination causes of action for plaintiffs. The Sixth Circuit clarified what constitutes a work force reduction in *Barnes v. GenCorp Inc.*, 896 F.2d 1457 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990), which describes the precise circumstances which led to Petitioner's job elimination:

> A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company.

Id. at 1465. Indeed, "'[t]he most common legitimate reasons' for a discharge are the work force reductions." *Id.*

> By showing the other elements of a *McDonnell Douglas* case, a plaintiff has not presented any evidence indicating that the work force reductions are not the reasons for the discharge and therefore does not make out a *prima facie* case **absent additional direct, circumstantial, or statistical evidence tending to indicate that the employer *singled out* the plaintiff for discharge for impermissible reasons.**

Id. at 1465 (emphasis added).[2] The *Barnes* court further noted that "[o]ur conclusion would not change even if a plaintiff additionally demonstrated that younger persons were retained in other jobs which the plaintiff was qualified to perform." *Id.*

In *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1091 (6th Cir. 1984), the Sixth Circuit held:

> [A]n age discrimination plaintiff who has been terminated amidst a corporate reorganization carries a greater burden of supporting charges of discrimination than an employee who was not terminated for similar reasons.[3]

Michigan courts have similarly applied the Elliott-Larsen Civil Rights Act. In a landmark age discrimination case, *Matras v. Amoco Oil Co.*, 424 Mich. 675, 385 N.W. 2d 586 (1986), the Michigan Supreme Court held that evidence that a competent older employee was terminated and a younger employee was retained, is insufficient standing alone to establish a case when the employer reduces his work force because of economic necessity. In *Plieth v. St. Raymond Church*, 210 Mich. App. 568, 534 N.W. 2d 164 (1995), the Michigan Court of Appeals adopted

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2. *See also Phelps v. Yale Security, Inc.*, 986 F.2d 1020, 1023 (6th Cir.), *cert. denied*, 114 S. Ct. 175 (1993); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 517 (6th Cir. 1991); *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1090-91 (6th Cir. 1984) ("[T]ermination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a *prima facie* case of age discrimination.").

3. *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 941 (6th Cir. 1987) ("Particularly where economic necessity dictates reorganization, a conclusory statement alone is not probative of age discrimination.").

this Court's view in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993), and held that *where an employer's decision is wholly motivated by factors other than age, even if the motivating factor is correlated with age, there is no disparate treatment under the Civil Rights Act*. The plaintiffs were required to present evidence that age was a determining factor in the decision to discharge. Therefore, an employee bears a greater burden of proof in establishing discrimination based on age when an employer reduces his work force.

There can be no dispute that Petitioner's position as senior account executive was eliminated in the course of Respondents' nationwide restructuring and reduction in force in 1989. [JA 584-585, 589, 804]. Petitioner understood that there were company wide cutbacks because "they were in the red." [JA 551]. Between 1988 and 1989, thirteen positions in the Troy facility were eliminated, including four of the five senior account executive positions. [JA 584-585, 776]. Respondents selected for retention the only account executive with an "outstanding" performance evaluation who had demonstrated the ability to sell profitably with fewer customer problems after sale. [JA 616]. Petitioner alone was offered two other positions at the same salary as an alternative to severance. [JA 520]. Petitioner refused both of the jobs and instead chose a severance package which gave him fifty-four (54) weeks of pay as a lump sum payout and retirement benefits effective March 1, 1990. [JA 394-395, 521, 572]. Because of his decision to refuse the offered work, Petitioner was severed from employment on or about August 11, 1989. [JA 527, 739, 743].

Petitioner had no circumstantial or statistical evidence to support his age discrimination claim. *See, e.g., Barnes*, 896 F.2d at 1466. In fact, Petitioner admitted that he does not believe any of his direct supervisors, Mr. Vasey, Ms. Maginity or Mr. Smith,

discriminated against him. [JA 546, 548, 559]. There is no proof that in the process of evaluating Petitioner and the other candidates for the account executive positions, that age was ever a factor in retaining the employee who had outstanding performance evaluations. In short, all that Petitioner offered the district court as evidence for his claim was his personal conclusion that his age was a factor in his termination. Petitioner's subjective belief that he was selected because of his age is insufficient to carry his burden of proof. *See e.g., Manzer v. Diamond Shamrock Chemicals Corp.*, 29 F.3d 1078 (6th Cir. 1994).[4]

The district court recognized plaintiff's failure to present evidence of discrimination when, at the close of plaintiff's case, it asked "So, where is it?" [JA 636]. At the conclusion of evidence, still troubled by the record evidence, the trial court again asked, "Where is the *age* discrimination?" (Emphasis added) [JA 637]. Even when queried by the trial court, Petitioner offered no evidence of age discrimination to the district court. Petitioner could not identify anyone in Respondent's management who discriminated against *him*. At best, in challenging Respondents' motion for judgment as a matter of law, Petitioner attempted to raise only some "metaphysical doubt" as to the facts — and that is all he has to offer this Court now. Nowhere did he show that he was *singled out* for job discontinuation because of his age. In sum, Petitioner failed to show the district court and fails to show this Court any evidence whatsoever of age discrimination in the termination of his position. When no answer was given to the trial court's question, the court erred in giving this case to the jury and not acting as the gate keeper that it is supposed to be.

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4. *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982); *Locke v. Commercial Union Ins. Co.*, 676 F.2d 205, 206 (6th Cir. 1982). *See also Matras v. Amoco Oil Co.*, 424 Mich. 675 (1986); *Plieth v. St. Raymond Church*, 210 Mich. App. 568 (1995).

Petitioner's only purported evidence in support of his claim of constructive discharge is that he thought he would fail in the positions offered. However, the Sixth Circuit expressly rejected Petitioner's theory in *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991). In *Wilson*, the Sixth Circuit affirmed the grant of a Rule 50 motion for judgment as a matter of law based upon the following facts. When Wilson's position was eliminated as a result of an economically motivated reorganization, he was presented with four options: (1) accepting a comparable position; (2) taking a lower-ranking position; (3) applying for a new job in the following two years; or (4) taking an early retirement/severance package. Wilson elected the last option — early retirement/severance package. The Sixth Circuit rejected Wilson's attempt to show that he was constructively discharged due to age discrimination. The presentation to him of other legitimate options for continued employment with the company precluded a finding that he was constructively discharged.

Petitioner was in a *better* position than Wilson since he was offered *two* comparable positions at the *same* salary. Despite Petitioner's self-serving testimony about his subjective fears, and his lawyer's unsubstantiated attempts to embellish that testimony, Petitioner offered no evidence showing that Respondents "intended to make his working conditions unpleasant had he stayed." *Wilson*, 932 F.2d at 515. Petitioner's subjective fear and/or apprehension regarding his own possible failure is *not* a sufficient basis to find discriminatory action on the part of Respondents. Speculation by Petitioner as to whether he could successfully perform in the offered work is *not* evidence upon which an age discrimination claim can be based.[5]

If the plaintiff in *Wilson* could not maintain a cause of action

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5. In fact, on cross-examination Petitioner admitted that he had "no doubt" that he was capable of doing both jobs offered. [JA 555].

for age discrimination, then certainly Petitioner cannot. Petitioner was not replaced. On July 31, 1989, Petitioner submitted his written election for retirement, to be effective on March 1, 1990. [JA 741]. Petitioner's last day of work was sometime prior to August 11, 1989. [JA 527, 739]. Petitioner received a lump sum of fifty-four (54) weeks pay as part of his severance package. On March 1, 1990, he began to collect his retirement income of $1,000 per month. [JA 394-395, 572].

In addition, the issue of the time interval between the decision to terminate and replace has been addressed by the Sixth Circuit in *Lilley v. BTM Corporation*, 958 F.2d 746, 752 (6th Cir. 1992). In *Lilley*, the plaintiff notified his employer in 1986 of an intent to retire, effective in October 1987. In July 1987, plaintiff was terminated from his position in sales. In April 1988, the employer hired a 29 year-old (Boehm) to work on its sales staff. The court held,

> The fact that nine months later business had picked up to the extent that another employee was needed in the sales department does not mean that Boehm replaced Lilley in any sense relevant to inferring age-based discrimination. *Cf. Simpson* [*v. Midland-Ross Corp.*], 823 F.2d [937,] 941 [(6th Cir. 1987)] *(three month interval "substantially weaken(s)" the inference).*

Lilley, 958 F.2d at 752 (emphasis added).

While Petitioner claims he was replaced by Barage, Barage was not hired until March 1990, after business conditions improved in February 1990. [JA 590-591, 776]. That was a full eight months after Petitioner's decision to retire. As the Sixth Circuit determined, the eight month interval between the time Petitioner quit working and someone else was hired cannot in

any sense be relevant to inferring age-based discrimination. Thus, Petitioner was not replaced.

B. Petitioner Did Not Carry His Burden Of Proof Showing That The Articulated Business Reason For Job Elimination Was Pretextual.

Equally glaring because of its absence is evidence of discriminatory animus. Respondents proved two separate legitimate business reasons for Petitioner's job discontinuance — (1) an economic reduction in force; and (2) Petitioner's lower performance ratings. Once these legitimate business reasons were presented, Petitioner had the burden to "produce evidence that age was a factor in the [constructive] discharge of the plaintiff and that but for this factor, plaintiff would not have been [constructively] discharged." *Phelps v. Yale Security, Inc.*, 986 F.2d 1020, 1023 (6th Cir. 1993); *see Wilson*, 932 F.2d at 514. No such evidence was presented in this case because none exists.

Petitioner's claim must fail because Respondents "articulated a legitimate business reason for the discharge in question." As the Sixth Circuit has stated:

> Unless the plaintiffs can show that the defendants' explanations are inherently suspect or can present other direct or circumstantial evidence suggesting that the proffered reasons are not true, then the defendants are entitled to summary judgment.

Barnes, 896 F.2d at 1469; *see also Hicks*, 113 S. Ct. at 2749; *Balwinski v. City of Bay City*, 168 Mich. App. 766, 425 N.W. 2d 218 (1988). Since Respondents have carried their burden of producing evidence of legitimate, nondiscriminatory reasons for Petitioner's termination — its restructuring and reduction in

force and Petitioner's lower performance ratings — Petitioner must produce additional evidence to rebut Respondents' explanation to show it was a pretext for age discrimination. *Hicks*, 113 S. Ct. at 2749; *Manzer*, 29 F.3d at 1083-1084. Petitioner must show either: (1) that Respondents' proffered reasons had no basis in fact; or (2) that the proffered reasons did not actually motivate his termination; or (3) that those reasons were insufficient to motivate his termination. *Manzer*, 29 F.3d at 1084. Petitioner did not and cannot produce such evidence.

In this case, jobs were eliminated in a legitimate economic cutback. [JA 584-585, 589, 599, 804]. Respondents articulated legitimate reasons for its selection of Urban over Petitioner to remain an account executive. That is, Urban had better performance evaluations. [JA 616, 750-775]. Petitioner himself had rated Urban as an outstanding account executive. [JA 547, 750-775]. Respondents selected the only employee with an "outstanding" performance evaluation who had demonstrated the ability to sell profitably with fewer customer problems after sale. [JA 616]. On cross-examination, Petitioner admitted that ranking and selecting employees on the basis of their performance appraisals would be a legitimate business decision. [JA 558-559]. Moreover, Vasey made the decision to discontinue Petitioner's account executive position, and Petitioner admitted that Vasey did not discriminate against him. [JA 558-559]. In fact, Petitioner was the only job discontinued individual who was offered comparable positions. [JA 520, 543-544, 676]. Petitioner admits that he refused the offered positions and instead chose to elect fifty four (54) weeks of severance and retire. [JA 561]. Respondents' legitimate business decisions to reduce force and select the highest rated employee for retention do not provide a basis for pretext.

Petitioner concedes that there was no direct proof of

discrimination. [Petitioner's Brief on Appeal at 18 and 24; JA 647]. Petitioner further concedes, by his silence, that he had no statistical proof of age discrimination. Rather, Petitioner's counsel posits three items as circumstantial proof of discrimination: (1) the alleged systematic removal of his authority by giving that authority to younger people; (2) the alleged violation of the Job Security policy found in Exhibit 71; and (3) the hiring of an account executive eight months after Petitioner left Respondents.

Even if Petitioner's counsel could somehow prove—which he cannot—that Murphy-Molloy engaged in a systematic removal of Petitioner's authority and gave that authority to younger people, he has not met his burden of proof to establish age discrimination. Absent the proof of an economic reduction in force, a systematic removal of authority may have been sufficient to prove one element of an age discrimination claim. However, in light of the undisputed economic reduction in force, that claim is wholly inadequate.[6] Petitioner's brief offers absolutely no proof that the economic reduction in force: (1) had no basis in fact; or (2) did not actually motivate the termination; or (3) was insufficient to motivate the termination. Simply no proof exists that Petitioner's age had anything to do with his selection for job discontinuance.

More importantly, absolutely no proof exists in the record that shows Murphy-Molloy forced the selection of Petitioner as one of the four account executives to be job discontinued. Quite the contrary, while Petitioner testified that Vasey did not discriminate against him [JA 559], the evidence in the record is

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6. Indeed, the retention of a person *not* within the protected class in a job similar to that of a discontinued worker within the protected class cannot be evidence sufficient to prove age discrimination in an economic reduction in force case or the results in *Wilson* and *Lilley* would have been different.

equally clear that Vasey decided which account executives would be job discontinued and which would be retained. [JA 615-616]. If the person who decided to eliminate Petitioner's job did not discriminate against him, we return to the original question: Where's the discrimination?

The second alleged circumstantial proof of discrimination is unsupported in the record. Petitioner's counsel argues that the failure of Respondents to retain him in the position of the sole remaining account executive was a violation of the company's seniority provisions in its personnel policy. [JA 777]. There is absolutely no proof in the record that Respondents violated any policy regarding the selection of persons to be job discontinued. To the contrary, the policy explicitly and unambiguously relates to actions to be taken by Respondents *after* a decision has been made to job discontinue an employee or group of employees. *Petitioner admitted this in his own testimony*. [JA 565]. Petitioner's counsel's creative editing aside, there is no proof that Respondents violated any seniority policy, and thus no inference that violation of such a policy is evidence of age discrimination can follow.[7]

Finally, Petitioner's claim that the hiring of another account executive (age 46) eight months after Petitioner left Respondents is insufficient to prove discriminatory animus as a matter of law. Likewise, the fact that business picks up and a company later hires cannot create an inference of age-based discrimination. *See Lilley*, *supra*; *Simpson*, *supra*. After Petitioner chose to retire, he expressed no interest in returning to work, nor did he express any dissatisfaction with his retirement. [JA 540-542]. The job Petitioner claims he should

7. With regard to Petitioner's purported "seniority factor" for determining job discontinuance, his use of testimony from prior litigation is taken out of context, deals with difference circumstances and is wholly irrelevant to the instant case.

have gotten was posted; however, he never applied for it. [JA 591, 611, 776]. The decision of Respondents to hire another individual eight months after Petitioner left the company with 54 weeks of pay as severance is not evidence to support a case of age discrimination, much less pretext. As previously noted, the Sixth Circuit has held,

> The fact that nine months later business had picked up to the extent that another employee was needed in the sales department does not mean that Boehm replaced Lilley in any sense relevant to inferring age-based discrimination.

Lilley, 958 F.2d at 752. Petitioner's counsel has offered no authority to the contrary.

In short, Petitioner has failed to demonstrate any legally sufficient proof of age discrimination in light of the economic reduction in force proven in the record. This Court should deny the petition for a writ of certiorari.

CONCLUSION

Petitioner's counsel has argued that the Sixth Circuit applied the wrong standard in evaluating this age discrimination case and that the reduction in force that resulted in the elimination of his position was simply a pretext for an age discriminatory dismissal. In order to sustain the district court judgment upon that argument, this Court must ignore the facts in the record and the controlling precedent of Michigan law, this Court and the Sixth Circuit. Petitioner failed to prove age discrimination in the trial court. That is why the trial court asked "Where is the discrimination?" The trial court erred by failing to recognize that its own question went unanswered.

The Sixth Circuit answered the district court's question — "There is none." Thus, Petitioner's sole ground for certiorari is that the Sixth Circuit decided this case incorrectly. However, as the forgoing establishes, the court of appeals correctly decided this case, its decision does not conflict with other court of appeals decisions or another panel of the same court, and it has not "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." Most significantly, Petitioner does not even argue that the questions presented by this case will have immediate importance beyond the particular facts and parties involved. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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